

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1073

To be argued by: J. Byron O'Connell, Esq.
O'Connell and Wolfe
Attorneys at Law
66 Margaret Street
Plattsburgh, New York 12901
Time Requested: 20 Minutes

B
P/S

UNITED STATES COURT OF APPEALS

Second Circuit

UNITED STATES OF AMERICA,

Plaintiff,

- against -

HOWARD P. GISKIN,

Defendant.

APPELLANT'S BRIEF AND APPENDIX

J. Byron O'Connell, Esq.
Attorney for Plaintiff-Appellant
66 Margaret Street
Plattsburgh, New York 12901

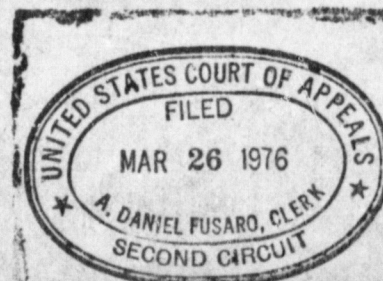


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STATEMENT OF ISSUES

The issues in this appeal are five fold:

First: Whether there was probable cause for the issuance of the search warrant.

SECOND: Whether the warrant, itself, was defective in not describing with specificity the place to be searched.

THIRD: Whether the sentence was excessive.

FOURTH: Whether the Court erred in not granting a complete disclosure as requested in the Bill of Particulars.

FIFTH: Whether the defendant was given the opportunity to address the Court prior to sentencing.

Factually, the chronological sequence of events seems to be:

1) In May of 1975, a Howard Cooper representing Educational Research, P.O. Box 721, Saranac Lake, New York, placed an order of phenyl-2-propanone along with laboratory equipment.

2) The contact telephone number for Howard Cooper was listed to Howard Giskin, Herron Hill Road, Dannemora, New York.

3) The Special Agent Bennie T. Mangor, who obtained the search warrant, believed that P.O. Box 721, Saranac Lake, New York and Literary Aids, Inc., Richmond, Vermont, were subterfuge addresses used to order precursors to manufacture methamphetamine.

4) That on or about 4 p.m. on July 28, 1975, an informant, who has demonstrated a pattern of reliability in the past, was met at the

front door of the Giskin residence by an unknown male who had white flakes in his hair and beard. The informant also smelled a chemical odor which he described as a putrified odor (the affidavit is devoid of any allegations showing how these facts were brought to the personal attention of the affiant).

5) On the evening of August 28, 1975, the affiant learned from DEA Chemist, Jack Fasanello that a "putrified odor" is indicative of amine free bases such as amphetamine or methamphetamine. (See affidavit to obtain search warrant).

6) A search warrant was obtained and then according to Special Agent-in-Charge Thomas M. Fitzpatrick, who testified at the Probable Cause hearing before Magistrate Henry Van Acker, he went to the defendant's home with the warrant and, at page 5 of the Probable Cause hearing where "B.O." stands for Attorney J. Byron O'Connell and "F" is Fitzpatrick, the witness and the uniformed troopers, New York State Police, knocked at the door and asked the defendant if they could use the telephone; at that point the defendant opened the door and Mr. Fitzpatrick entered between the two troopers and told the defendant that they were Federal Officers with a search warrant. Subsequently the 10 ounces of methamphetamine described in the Indictment was taken into the custody of the Federal Officers. Mr. Fitzpatrick also testified at page 8 that there was evidence that Mr. Giskin's wife probably had resided with him there at one time and there was evidence that a female friend had stayed there at one time which was verified by Mr. Giskin and further the place appeared to have been a place where other people were at various times. Mr. Fitzpatrick further testified at page 9 of the

Probable Cause hearing that there was another place about 500 feet closer to Route 374 which was an A-frame cottage. Mr. Fitzpatrick further testified that he made his inventory and slid a copy of the search warrant with the inventory on it under the door (page 17).

Mr. Mangor testified that he signed the affidavit with the search warrant before Judge Van Acker. He testified that (at page 23) no one was produced before Judge Van Acker to be examined under Oath personally before the issuance of a search warrant. He testified he got the search warrant at 1:30 a.m. August 29, 1975 (a night-time search); that he left the affidavit with the Judge; he testified (at pages 22 and 23) on the basis of the affidavit, the search warrant was issued. He testified he did not give the Judge any further information. At pages 22 and 23, "M" stands for Mangor and "B.O." stands for Byron O'Connell. At page 27, he was asked what knowledge he had to take this affidavit before his Honor, referring to the Magistrate, for a search warrant and he answered through investigations conducted by Agents of DEA and he was asked did you conduct, did you make this investigation yourself and he answered not that particular facet of the investigation. At page 29, Agent Mangor was asked about his affidavit by this writer when I asked him "and then you say on July 28th at 4 p.m. an informant who had demonstrated a pattern of reliability in the past was greeted at the front door of the Giskin residence by an unknown male who had white flakes of an unknown substance. How did this informant advise you of this or did he advise somebody else of this?" Mangor answered that the informant advised someone else of this and so I asked "he didn't advise you at all" and he answered "correct".

It would, therefore, appear that the affidavit for the search warrant contained information as to what the informant "who has demonstrated a pattern of reliability in the past" told someone else about what he smelled and what he saw and that someone else told affiant and that affiant made the allegations in his affidavit.

The informant, by his own admissions, (at page 81 of the Suppression Hearing minutes) did make a report of his observations to Mr. Fitzpatrick rather than to Mr. Mangor and Mr. Fitzpatrick did not make the affidavit before the Magistrate.

At page 75, the informant admits he operates as an agent for the DEA on a contingency fee basis, contingent upon a conviction. The informant admits (at page 76) he didn't go to the door of Mr. Giskin's house, so obviously he didn't look into Mr. Giskin's house to actually see anything happening. He does not tell us where the stench of putrefaction like a decaying body, came from. In an attempt to bolster him, the Assistant U.S. Attorney, Mr. Cullum has him testify (at page 82) that he has worked on a hundred cases with Mr. Fitzpatrick and obtained three Federal convictions relating to narcotic offenses. This information was never relayed to Judge Van Acker.

The Government Chemist, Jack Fasanello, when called as a witness at the Suppression Hearing, admitted that the putrified odor could have been a dead body or rotting meat, and admitted he told Mangor it was a good probability (page 72) that amphetamine or methamphetamine was being produced and he didn't know how good a possibility it was that rotting flesh was upon the premises.

Witness Dragoon testifying for the defense, identified the defendant's home from photographs which were exhibits and testified that there were other bearded males on the premises and there was an odor of rotting flesh from garbage in the yard during the summer of 1975.

Witness Sharron Giskin testified that she was the co-owner of the premises which were searched and she identified photographs of the premises that were searched. She testified that there was a garbage truck in the front yard that exuded the smell of rotting meat and she testified as to four other males with beards besides her husband who occupied the premises.

Witness Barber, a land surveyor, testified as to the location of another similar house owned by Margaret Nash or Mildred Nash on the same side of the Herron Hill Road approximately 1.13 miles from Route 374 and that the defendant's home was 1.24 miles or almost 1.3 miles. He testified further that the homes were almost identical.

The search warrant, itself, simply said Howard Giskin's residence, it did not say a home owned by Howard Giskin and Sharron Giskin. Certainly the Government had no authority from Sharron Giskin to go into the home occupied by her husband and owned by herself and her husband, nor were they arresting Sharron Giskin, nor did they have a search warrant addressed against Sharron Giskin.

The defendant was indicted on the basis of the 10 ounces of methamphetamine which were found in his residence on the Herron

Hill Road on August 29, 1975 by a U.S. Grand Jury. He appeared for arraignment before Mr. Justice James E. Foley on December 1, 1975 and the case was sent from Albany to Utica for a hearing on the defendant's Motion for Suppression and the defendant's Motion

Bill of Particulars. Judge Port heard the Motion for Suppression on January 14, 1976 and decided the same on January 19, 1976; that the defendant under the procedure approved by the United States Court of Appeals, Second Circuit, U.S. v. Burks 517 F 2d 377, plead guilty and was sentenced on January 30, 1976. He was sentenced to a term of three years, at least six months of which would have to be served in a Federal institution; he is currently free on bail pending disposition of his case upon the constitutional ground throughout the Appellate Court system.

ARGUMENT

POINT I

THERE WAS NO PROBABLE CAUSE
FOR THE ISSUANCE OF THE
SEARCH WARRANT.

In this respect, I would point out to the Court that the informant did not even communicate with the affiant directly; that the Magistrate had before him hearsay evidence twice removed from a person "who had demonstrated a pattern of reliability in the past", no evidence of prior conviction was presented to the Magistrate so the Magistrate knew that someone who had given the defendant's telephone number had ordered the precursor of methamphetamine; that there were, in fact, these corporations is proven by the exhibits before the Court; the Magistrate knew at least by affidavit that at 4 p.m. on July 28, 1975 this informant was met by an unknown male with a beard and white flakes in his hair at the front door of the Giskin residence and that this informant smelled a "putrefied odor" and that the affiant had called a chemist who said that the putrefied odor was indicative of amphetamine or methamphetamine.

In the Freeborn case, decided by this Court at 358 F 2d 459 the informant actually saw the heroin and in that case the Government Agent had seen the defendant meeting with known addicts and seen him transferring narcotics to heroin addicts. This Court said in that case that this was a substantial basis for crediting the hearsay required of Jones vs. U.S.A. 362 U.S. 257, 80 S. Ct. 725, 78 ALR 2d 233, 4 L Ed 2nd 697. Judge Van Acker's test, based upon the affidavit, should have been a neutral and detached opinion and not simply rubber stamping

of police activities as contended in Aguilar v. Texas, 378 U.S. 108.

In the case at bar, we have someone ordering what might be a precursor and giving a telephone number identical to the defendant's phone number. We have an agent's belief that the orderers were fronts or phonies; actually they were corporations.

We have an informant who doesn't have much to inform about, who doesn't see any crime being committed, doesn't see drugs being manufactured but who, according to the affiant a month and a day before the issuance of the search warrant, saw a male with white specks in his beard and smelled a strong putrefied odor and we have an affiant who did not talk to the informant, but who telephonically verified with a chemist that this was indicative of aminefree bases such as amphetamine or methamphetamine.

It is the contention of the defense that Aguilar v. Texas 378 U.S. 108, 121 L Ed 2d 723, 84 C. Ct. 1509 and Spinelli v. U.S., 393 U.S. 410, 21 L Ed 2d 637, 89 S. Ct. 584 standards were not met. The informant did not witness the crime; he did not conclude from his observations that a drug was being manufactured, he did not see any drugs inside the defendant's home; his information under the Aguilar and Spinelli test was not tested as to reliability by either independent corroborative verification of his tale or by showing that he had previously supplied accurate information. There was simply a statement "that he had demonstrated a pattern of reliability in the past". In Draper v. U.S., 358 U.S. 307, 3 L Ed 2d 327, 79 S. Ct. 329, the informant was checked out and the details were checked out prior to the arrest.

It would seem that it is obscene for the United States of America to employ people as informers, their fee being contingent upon a conviction. This would seem to the writer to be abhorrent to democracy and more consonant with fascism. The affiant did not even call him a "credible person" or a "confidential reliable informant"; he simply said "he had demonstrated a pattern of reliability in the past", whatever that means.

The underlying circumstances that enable the Magistrate, as a neutral and detached person rather than a police officer engaged in the enterprise of ferreting out crime to independently judge the validity of the information and conclude that narcotics were there was not set forth in the affidavit. All this Magistrate had in his affidavit was a hypothetical opinion that these facts were indicative of the possibility of the manufacturing of illegal drugs and on the basis thereof, Magistrate Van Acker authorized the U.S. Police authorities, Agents of the DEA, to violate the rights of Howard Giskin to be secure in his person, home, papers and effects against unreasonable searches and seizures. Magistrate Van Acker issued a warrant, but not upon probable cause since there was no support in the affidavit as to the informant's reliability or that the informant had anything to inform about. In the Spinelli case, the F.B.I agents had watched Spinelli for five days. He was a known bookmaker and they had a confidential reliable informant who told them that Spinelli was running a book and was using two phone numbers which he gave them to run the book, and they had checked these phone numbers out and they were in the apartment. This, according to the Court in Spinelli, was not enough of a common sense reading of the affidavit to issue the warrant as was required in U.S. v. Ventiesca, 380 U.S. 102,

13 L Ed 684, 85 S. Ct. 741. In the case at bar, the phone numbers given for the precursors were checked. There was no surveillance and no conclusion by the informer. We have a hypothetical opinion given on facts supplied by the informer; the informer made an observation, but not of a crime, simply of sight and smell: he was never in the house and never saw the manufacture. Breinegar v. U.S. 388 U.S. 160, 93 L Ed 1879, 69 S. Ct., 1302; Wolf v. Colorado 388 U.S. 25, 93 L.Ed 1782, 69 S. Ct. 1359; Trupiano v. U.S. 334 U.S. 699) 92 L Ed. 1663 set forth the general philosophy concerning the Fourth Amendment. They say that the security of one's property against arbitrary intrusion by the police is basic to a free society; that the provisions of our Fourth Amendment are not second class rights but belong in the catalog of indispensable freedoms; that further among deprivations of rights, none is so effective in crushing the population, crushing the spirit of the individual and putting terror in every heart as the uncontrolled search and seizure which is one of the first and foremost weapons in the arsenal of an arbitrary government...that human personality deteriorates, dignity and self-reliance disappear when one's person and possessions are subjected at any hour to unheralded search and seizure by the police... that a knock at the door, without proper legal authority as a prelude to a search is inconsistent with the conception of human rights enshrined in the history of English speaking people; that a truly judicial officer, not a rubber stamp for the police, must be interposed between the police hot in the pursuit of a crime and a citizen. Before the Magistrate in the case at bar, we have an affiant

speaking to a judicial officer concerning not what was told him directly, but what was told a fellow officer concerning an observation of sight and smell and a police officer speaking to a Magistrate stating that the defendant's phone number was given by someone who ordered the raw materials of the crime and this phone number checked out with my client's phone number and we have an informant telling a Magistrate of a hypothetical opinion given by a chemist who had no direct knowledge. Where is the independent corroborative verification of the informant's tale? Where is the showing that the informer previously supplied accurate information?

In the instant case, the informant does not appear to have any personal beliefs or suspicions, he simply reports on a visit. Where is the explanation as to how the facts concerning the visit came to the affiant's attention? There is no independent verification and separate objective checking of the informer's tale. There is nothing in the affidavit to show that the affiant or any officer of the DEA took affirmative action to verify the informer's report of "July 28, 1975", his visit to the Giskin residence between the time of the alleged visit and the affiant's conference with the DEA chemist a month later. While the facts might give rise to a suspicious inference of the present on-going commission of a crime, they are insufficient for a finding of probable cause. The underlying facts noted as a basis for affiant's belief that a crime was being committed are the existence of two addresses, the relevance of only one of which affiant even attempts to illustrate, and a report of the placement of an order for a chemical compound and laboratory equipment by one Howard Cooper. The unlawful use of the two addresses is a mere inference founded on yet another

inference that there indeed was a conspiracy to manufacture and distribute methamphetamine which itself has as its foundation the inference of illegal manufacturing activities being carried on at the Giskin residence.

The foundation on which this rather precarious pyramid was constructed was the report of an unknown male with white flakes in his hair and beard and the presence of a putrefied odor at the Giskin residence. That report is the contribution of an unidentified informer whose credibility and reliability are insufficiently demonstrated in the affidavit and in which affidavit any allegations of any corroborating investigation by the DEA agents is also notably lacking. As the Court quoted in the Spinelli case, there is nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. See *Spinelli v. United States*, 393 U.S. 410, 418 (1968). There is no rationale offered in the within case to explain why such an intensive verification effort by DEA agents was not conducted during the month between receipt of informant's tale and issuance of the search warrant, or if such an investigation was made, why the particulars of that corroborating evidence were omitted from the affidavit for search warrant. A mere allegation of past reliability of an informant is inconclusive of his reliability in the present instance and here we only have a "pattern of reliability" without allegations of independent corroborative investigation of such report by affiant to justify issuance of a search warrant. The other factual allegations noted

in the affidavit for search warrant do not raise the issues presented from that which is indicative of suspicious conduct to that which illustrates that a crime is being committed on the specified premises.

POINT II

THE WARRANT WAS DEFECTIVE
IN THAT IT DID NOT DESCRIBE
WITH SPECIFICITY THE PLACE TO
BE SEARCHED.

As appears in the exhibits and the testimony of the witnesses referred to in the Statement of Facts, there was no redwood paneled cottage structure on the right side of the Herron Hill Road exactly 1.2 miles from Route 374; in fact there were two red paneled residences, one less than 1.2 miles and one slightly more than 1.2 miles; neither of the cottages were the exclusive residence of Howard Giskin; the one that was searched was the residence of Howard Giskin and Sharron Giskin and other persons so the warrant did not sufficiently identify the premises to be searched as required under Amendment Four, U.S. Constitution, "particularly describing the place to be searched and the person or things to be seized"; also, the execution of the search warrant in gaining of entry by a ruse that some police officers wanted to use the telephone and the allowance of the warrant at any time in the day or night certainly does not seem justified. Also, the police officers admitted at the Probable Cause hearing they took other property not set forth in the inventory or warrant, but set forth in a letter dated October 20, 1975 from Agent Thomas M. Fitzpatrick.

POINT III

THE SENTENCE WAS
EXCESSIVE.

Although the Court had the right to sentence the defendant up to five years, a sentence of three years where the defendant was a first offender and had no prior criminal record and had not actually disposed of any of the illegal substance, was certainly excessive and an abuse of discretion.

POINT IV

THE COURT ERRED IN NOT
GRANTING A COMPLETE DIS-
CLOSURE AS REQUESTED IN THE
MOTION FOR BILL OF PARTICULARS.

The defense was precluded from obtaining the names and addresses of the witnesses and although the Government stipulated that the ten ounces of methamphetamine referred to in the Indictment were found in the search executed pursuant to the search warrant, the defense should have been entitled to see which ten ounces the Government was referring to since the Probable Cause hearing indicated pounds rather than ounces. This would have made it easier for the defendant to defend himself. As a matter of fact, employing the procedure approved by the Circuit Court of Appeals in U.S. v. Burks, 517 Fed 2d 377, the defendant was put into a position where he pled guilty and appealed since it seemed the only defense to the matter, to wit, his appeal on constitutional grounds. If the Court had granted a look at the Grand Jury Minutes, the defendant would have been better able to decide if he had any other defenses.

POINT V

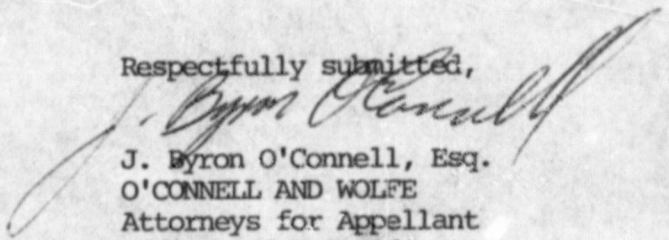
THE DEFENDANT WAS NOT GIVEN AN
OPPORTUNITY TO ADDRESS THE COURT
BEFORE SENTENCING SEPARATE FROM
HIS COUNSEL.

He corrected his counsel's errors, but was not asked by the
Court if he himself had anything to say.

CONCLUSION

THE ORDER DENYING THE MOTION FOR
SUPPRESSION SHOULD BE REVERSED
AND THE CASE REMANDED TO THE U.S.
DISTRICT COURT WHEREIN THE U.S.
ATTORNEY SHOULD MOVE FOR A DISMISSAL
OR PROCEED WITHOUT THE ILLEGALLY
OBTAINED SUBJECT OF THE INDICTMENT.

Respectfully submitted,


J. Byron O'Connell, Esq.
O'CONNELL AND WOLFE
Attorneys for Appellant
Office and P.O. Address
66 Margaret Street
Plattsburgh, New York 12901
Tel. No. 518-561-1440

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

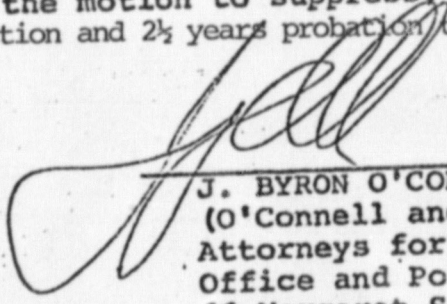
HOWARD P. GISKIN

: Cr. No. 75-CR-136
: VIO: Title 21, U.S.C.
: Section 841(a)
:
:
:
:
:
:

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Howard P. Giskin, the defendant above named, hereby appeals to the United States Court of appeals for the Second Circuit, from an Order of the United States District Court, Northern District of New York, of the Hon. Edmund Port, denying his motion for suppression (~~xerox copy of which is appended hereto~~); denying in part a motion for a Bill of Particulars (~~xerox copy of which is appended hereto~~); and from all of the proceedings had herein, including the judgment of conviction entered upon the plea of guilty after the denial of the motion to suppress, and the sentencing thereon of three years 6 months incarceration and 2½ years probation thereafter.

January 30, 1976.


J. BYRON O'CONNELL
(O'Connell and Wolfe, Esqs.)
Attorneys for Petitioner
Office and Post Office Address
66 Margaret Street
Plattsburgh, New York 12901
Tel. (518) 561-1440

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

HOWARD P. GISKIN

I N D I C T M E N T

Cr. No. 75-CR-136

(VIO: Title 21, U.S.C.
Section 841(a))

COUNT I.

THE GRAND JURY CHARGES:

That from on or about June 26, 1975, to on or about August 29, 1975, at or near Dannemora, in the State and Northern District of New York, HOWARD P. GISKIN, the defendant herein, did willfully, knowingly, unlawfully and intentionally manufacture and possess with intent to distribute a controlled substance as set forth in Schedule II of Subchapter I of Title 21, United States Code, Chapter 13 and the regulations of the United States Attorney General made pursuant thereto, to wit: approximately 10 ounces of Methamphetamine.

In violation of Title 21, United States Code, Section 841 (a).

A TRUE BILL

S/Walter F. Johnston
FOREMAN

S/James M. Sullivan, Jr.
UNITED STATES ATTORNEY

Exhibit B

United States District Court

FOR THE

Northern District of New York

UNITED STATES OF AMERICA

VS.

Howard GISKIN et al

Magistrate's Docket No. _____

Case No. _____

AFFIDAVIT FOR
SEARCH WARRANTBEFORE Henry C. VanAcker
Name of MagistrateChamplain, N.Y.
Address of Magistrate

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that ~~(on the person of)~~
(is positive) (on the premises known as)

Howard GISKINs residence a red wood paneled cottage structure with a glass front and deck porch located by traveling west on Rt. 374 then taking the 1st left turn after leaving the Village of Dannemora proceeding on a tar road 1.2 miles whereby the residence is on the right side of the road (Herron Hill Road), as proceeding in a south-westerly direction.

in the Northern District of New York

there is now being concealed certain property, namely an illicit laboratory manufacturing methamphetamine a controlled substance schedule 1.

here describe property

a true copy
Henry V. Acker

HENRY VAN ACKER, JR.
U.S. MAGISTRATE
NORTHERN DISTRICT OF NEW YORK

which are contraband; controlled substances illegally manufactured and possessed in violation of 21 USC 841(a)1 and 21 USC 846.
Here give alleged grounds for search and seizure

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: From on or about the 7th day of May and continuously up to and including the date of the filing of this affidavit, in the Northern District of New York, Howard GISKIN et al and others unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate 21 USC 846; It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would manufacture illegally and possess with intent to distribute Schedule 1 controlled substance the exact amount thereof being unknown in violation of 21 USC 841(a)1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 7th day of May 1975 in the Northern District of New York a Howard Cooper representing Educational Research, P.O. Box 721, Saranac Lake, N.Y. placed an order of phenyl-2-propanone along with laboratory equipment. That the contact telephone number for Howard Cooper is listed to Howard GISKIN, Herron Hill Road, Dannemora, N.Y. It is believed that P.O. Box 721, Saranac Lake, N.Y. and Literary Aids Inc., Richmond, Vermont are subterfuge addresses used to order precursors to manufacture methamphetamine. That on July 28, 1975 at approximately 4pm an informant who has demonstrated a pattern of reliability in the past was greeted at the front

Benny T. Mangor

Special Agent

Signature of Agent.

Official Title, if any.

August 29, 1975

Sworn to before me, and subscribed in my presence,

Henry Van Acker

United States Magistrate.

* The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are probable cause the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

door of the GISKIN residence by an unknown male who had white flakes of an unknown substance scattered on his hair and beard. That the informant smelled a strong chemical odor which he described as a "putrified odor".

On the evening of August 28, 1975 SA Benny T. Mangor learned from DEA Chemist Jack Fasanello that a putrified odor is indicative of amine free bases such as amphetamine or methamphetamine.

A true copy
Henry Van Acker

HENRY VAN ACKER, JR.

U.S. MAGISTRATE

NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
for the
Northern District of New York

UNITED STATES OF AMERICA

Magistrates Docket No.

v.

Case No.

HOWARD GISKIN, et al

SEARCH WARRANT

To Any U.S. Marshall or other authorized Officer

Affidavit having been made before me by Special Agent Benny T. Mangor that he has reason to believe that on the premises known as Howard Giskins residence a red wood paneled cottage structure with a glass front and deck porch located by traveling west on Route 374, then taking the 1st left turn after leaving the Village of Dannemora proceeding on a tar road 1.2 miles whereby the residence is on the right side of the road (Herron Hill Road), as proceeding in a south-westerly direction in the Northern District of New York there is now being concealed certain property, namely an illicit laboratory manufacturing methamphetamine a controlled substance Schedule 1 which are contraband; controlled substances illegally manufactured and possessed in violation of 21 USC 841(a)1 and 21 USC 846 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there

to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 29th day of August 1975.

/s/ Henry Van Acker, Jr.
U.S. Magistrate

RETURN

I received the attached search warrant 1:30 A.M. August 29, 1975 and have executed it as follows:

On August 29, 1975 at 4:40 o'clock A.M. I searched the premises described in the warrant and

I left a copy of the warrant with Howard Giskin together with a receipt for the items seized.

The following is an inventory of the property taken pursuant to the warrant:

Paraphernalia for a illicit methamphetamine laboratory.

7141.0 grams methamphetamine (gross weight)

The inventory was made in the presence of

SA Benny T. Mangor and SA Francis M. Dunham

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/
SA Benny T. Mangor

Subscribed and sworn to and returned before me this 3rd day of September 1975.

/s/ Henry Van Acker
U.S. Magistrate

UNITED STATES DISTRICT COURT
for the
Northern District of New York

UNITED STATES OF AMERICA

Magistrate's Docket No.
Case No.

v.

HOWARD P. GISKIN

COMPLAINT FOR VIOLATION OF U.S.C.
Title 21 Section 841(a)1; 846

BEFORE Henry C. VanAcker
Name of Magistrate

Champlain, New York
Address of Magistrate

The undersigned complainant being duly sworn states:

That on or about August 29, 1975 at Dannemora, New York in the
Northern District of New York Howard P. Giskin did knowingly, willfully,
and unlawfully operate an illicit laboratory manufacturing methamphetamine
a controlled substance schedule 1; with the intent to distribute
And the complainant states that this complaint is based on the execution
of a search warrant at Howard P. Giskin's residence.
And the complainant further states that he believes that
SAIC Thomas M. Fitzpatrick, SA Benny T. Mangor, SA Francis M. Dunham
SA Richard Klien are material witnesses in relation to this charge.

s/ Thomas M. Fitzpatrick
Special Agent in Charge

Sworn to before me in my presence August 29, 1975

/s/ Henry Van Acker Jr.
U.S. Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

VS.

HOWARD P. GISKIN.

Cr. No. 75-CR-136
VIO: Title 21, U.S.C.
Section 841(a)

AMENDED MOTION FOR
BILL OF PARTICULARS

The Defendant moves the Court for an order directing the United States of America to file a bill of particulars of the following matters embraced within the indictment:

1. A statement as to when, where and under what circumstances the United States of America obtained approximately ten (10) ounces of methamphetamine from the Defendant, Howard P. Giskin.
2. A record of the Grand Jury minutes against my client.
3. A record of the Probable Cause hearing which minutes have been refused the undersigned by the U. S. Magistrate, Henry Van Acker, see copy of letter attached.
4. A complete inventory of all items in the possession of the United States of America which were taken from the Defendant, Howard P. Giskin of and pursuant to an alleged proper search warrant issued by the U. S. Magistrate, a xerox copy of which I have appended hereto.
5. The names and addresses of all witnesses the Government intends to use against the Defendant, their telephone numbers at

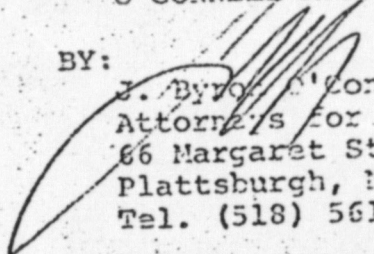
home and at work and their places of employment; particularly if there are any alleged reliable informants who are federal agents or federal agents who are employed by the Drug Enforcement Administration.

6. The grounds for this motion are that the defendant cannot be properly prepared for trial without this information and desires to be fully and adequately apprised of the nature and scope of the accusations against him, to have an opportunity to adequately prepare his defense to minimize or avoid the danger of surprise at the trial and to clarify the issues and to protect him against a second prosecution for the same offense.

YOURS ETC.,

O'CONNELL AND WOLFE

BY:


J. Byron O'Connell
Attorneys for Petitioner
66 Margaret Street
Plattsburgh, New York, 12901
Tel. (518) 561-1440

P. O. Box 38
Rouses Point, NY 12979

October 22, 1975

REGISTERED MAIL-RETURN RECEIPT REQUESTED

Mr. Howard Giskin
Herron Road
Dannemora, New York 12929

Dear Mr. Giskin:

Inquiry on your behalf has been received from your attorney relative to items seized and allegedly seized on August 29, 1975, when a search warrant was executed by Agents of this office upon your residence.

Please be advised that the following items are being retained by this office as evidence:

- 1 (one) - 225 Savage rifle, Model 340V, Serial #206225, with scope, carrying case, and 20 rounds of 225 ammunition.
- 1 (one) - timer
- 1 (one) - hot plate
- 1 (one) - pocket calculator
- 2 (two) - scales
- 1 (one) - mortar
- 1 (one) - pestle
- 2 (two) - thermometers
- 2 (two) - beakers
- 4 (four) - pans (trays)
- 1 (one) - passport
- 2 (two) - notebooks
- 2 (two) - reference books
- 1 (one) - rheostat
- 5 (five) - cassette tapes
- 26 (twenty-six) - documentary exhibits (notes, papers, letters, etc.)

Also, please be advised that the following listed items were not taken from your premises:

- 1 (one) - set of handcuffs
- 1 (one) - enlarger
- 1 (one) - silver certificate

If this office can be of any further assistance to you or your attorney,
please do not hesitate to contact us.

Sincerely yours,

Thomas M. Fitzpatrick

Thomas M. Fitzpatrick
Special Agent-in-Charge

cc: Mr. J. Byron O'Connell

5.
BO: Its not signed... well I can use this one for questioning purposes.

HVA: Okey, just 2 second.

BO: Evidently , Mr. Mangor, who's 2 special agent under you in DEA signed this affidavit before Judge VAn Acker.

F: That is correct.

BO: And Judge Van Acker issued the warrant which is over there and is the warrant which you had on your possession. Was there any other affidavit other than this affidavit here before Judge Van Acker issued the search warrant, was there sir?

F: Not to my knowledge.

BO: Did you have the original affidavit and the original search warrant when you went to the man's home or did you have a copy of it?

F: We had the original.

BO: I see. You had the two original papers, affidavit for a search warrant and search warrant on August 29, 1974 - 75. Now Mr...you said that the only people there, Mr. Fitzpatrick, when you went into the man's home were some agents of the state police, you've named 2 Mr. Fred Wright, who's head of the BCI Office here in the Plattsburgh area, you named a couple of troopers, Trooper Sanger and you said there was a couple of federal agents, Mr. Mangor and Mr. Dunham.

F: That is correct.

BO: Were any news media there with you?

F: No.

BO: Were you there for quite a while, conducting this search?

F: We had people there through the bulk of the day till about 5:15 or 5:30.

BO: And you went to the door, were you the one that went to the door first? Cause you were in charge of this matter.

F: The uniformed troopers knocked, and asked Mr. Giskin if they could use the phone. And at that point I proceeded to...

BO: Did Mr. Giskin open the door?

F: Yes he did.

BO: And what did you do?

F: At that point I came through between the two troopers and told him that we were federal officers with a search warrant.

(Page 5 - Probable Cause Hearing -T Fitzpatrick)

BO: This only turns a orange brown color if tis methamphetamine?

F: It is a field test and has to be eventually confirmed by laboratory analysis.

BO: And did you, you say the, this was the stuff that was in the oven?

F: Yes it was the stuff that was in the oven.

BO: Any other stuff found on the first floor or the second floor?

F: On the first floor there was four bags of white powder in various stages of granulation.

BO: Was it field tested?

F: Yes it was

BO: Did it all come out positive?

F: Positive.

BO: Again by Special Agent Mangor?

F: I believe it was special Agent Mangor on that also.

BO: Did you find anything upstairs or did you go upstairs? I mean the second floor.

F: There was nothing found upstairs as far as I know.

BO: You said there was evidence, I think you told the U.S. Attorney that there was evidence that other people lived there. Was there ladies clothing there? Pair of pants? Other peoples clothing? I think you told the U.S. Attorney that other people lived there and there was evidence of it.

F: There was evidence that other people and lived there or stayed there.

BO: What evidence?

F: There was evidence, documentary evidence, that Mr. Giskins wife probably had resided with him there at one time. There was evidence that a female friend may have stayed there at one time which was verified by Mr. Giskin.

BO: It wasn't a place where Mr. Giskin lived all by himself all the time?

F: It appeared as if there may have been other people there at various times.

BO: You are pretty well acquainted with the area aren't you officer?

BO: You've been up to the general area, you've been up that road a few times?

F: We have.

BO: About 500 feet towards route 374 there's another A frame, isn't there?

F: That is correct. Five Hundred Feet from where?

BO: And it's

F: 500 feet from where?

BO: Going from where Mr. Gisking's house is, going towards the Route 374.

F: Um-mm. But Mr. Giskin's house isn't a A-frame.

BO: Well there's another redwood paneled cottage isn't there?

F: There's a A-frame cottage.

BO: Is it paneled in redwood?

F: It may very well be.

BO: It's about 500 feet....

F: But it's not a mile and two tenths from Route 374.

BO: But it's about 500 feet closer to Route 374 than Mr. Giskin's house, isn't it?

F: I couldn't say if it's 500 feet.

BO: Tenth of a mile?

F: Well that's almost the same.

BO: All right. Now, let me ask you this sir, you may, you field tested your premise the methamphetamine that was found in the first floor, the main floor, is that right?

F: That is correct.

BO: Was the methamphetamine that was found in the, or the substance you've identified as methamphetamine, that was found in the basement, was that field tested in your presence too?

F: I was not present for that testing the DEA Chemist, Jack Fassenello tested that I believe in the presence of Special Agent Dunham.

BO: And that was field tested again sir?

17.
F: Oh well

F: Could I go look at the

BO: Yee sure.

F: This is the one you found.

BO: Yes sir

F: Oh

BO: The original I guess went back to the judge

F: Yee that's correct. Still it holds true that we needed to weigh this stuff before we could make a return. So we took¹ back to his home, slid it under the door. No one answered.

BO: And you haven't been back in there since?

F: No. We just went to the door sir and knocked and slid it under the door to protect it from weather and things.

BO: Now, eh, did the government also have an electronic eavesdropping on his telephone?

F: No sir.

BO: Or in his car?

F: No sir.

BO: No court order was applied for...no court order was applied for electronic eavesdropping?

F: No sir.

BO: Mr. Giskin's car or Mr. Giskin's telephone?

F: Neither.

BO: Nor was there any electronics?

WD: Course, your honor, these are discovery matters, not probable cause matters.

HVA: Were you going to pursue this any farther?

WD: No questions on redirect. The government will rest on Mr. Fitzpatrick's testimony.

BO: I might ask that as long as Mr. Mangor is here and they have stated that he is a witness and Mr. Dunham we could take his testimony I'd like to call - I'd like to call him

HVA: Well I believe, eh, you have a right to call him.

BO: They're here, I'd like to call Special Agent Benny T. Mangor.

WD: Is he here?

BO: Yeah, said he was here.

WD: Mr. Mangor
This will be a defense witness

BO: I'll admit I am bound by his answers, sir.

HVA: Do you have the chemist's - the spelling of the chemist's name?

WD: Perhaps Mr. Mangor knows how it's spelled, first name is Jack, the last name is spelled Fe

HVA: Just a minute.. Fe

WD: FASANELLO

HVA: Okay, thank you. Agent Mangor, do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

M: I do

BO: Mr. Mangor, did you sign an affidavit and date a search warrant before Judge Van Acker? I'm showing you the affidavit the judge has handed me.

M: That's correct, I did.

BO: You signed it, Benny T. Mangor? Special Agent DEA August 29, 1975 before Henry Van Acker?

M: Yes.

BO: And on the basis of this affidavit the search warrant was issued, is that correct?

M: Yes.

BO: Was there any other affidavit submitted to Judge Van Acker prior to the issuance of the search warrant?

M: No.

BO: Anybody produced before Judge Van Acker to be examined under oath personally before the issuance of the search warrant?

M: No.

BO: Do you know about what time you got this search warrant?

M: Approximate time, yes.

BO: Can you tell me, sir, there's the search warrant and here's the affidavit

M: Approximately 1:30 PM - August 29th, 1975.

BO: And pursuant to this search warrant or did you with this search warrant and affidavit, did you take the search warrant and affidavit with you?

M: No, I did not.

BO: Leave the affidavit with the Judge

M: Correct.

BO: Took the search warrant with you and I assume there came a time when you went to Mr. Giskin's premises.

M: Yes.

BO: Can you tell us what happened there, please?

M: At the time of entry or what point in time?

BO: As soon as you got there.

M: As soon as we got to Mr. Giskin's residence, we entered the residence and started conducting a search pursuant to the warrant.

BO: And what did you do?

HVA: I'll let you continue for a while in connection with the affidavit as to the search warrant is that....

BO: All right. You say in here in this affidavit for a search warrant, Special Agent Mangor, that from the seventh of May, and up to including the date of filing the affidavit that you, that Giskin conspired, confederated and agreed with someone else to violate the U.S. Code, do you have any factual basis for that allegation?

M: Investigation conducted by DEA Special Agents.

BO: And who did he conspire with?

M: I believe on the affidavit you'll see that there is also a Howard Cooper.

BO: He conspired with Howard Cooper?

M: A possibility at that time.

BO: And then you say that is was part of this conspiracy that the defendants, and you use the word plural, defendants, unlawfully, intentionally and knowingly did manufacture and possess, a substance this methamphetamine substance, I assume, and they say in pursuance of the conspiracy and to effect the objects thereof, on the 7th of May, Howard Cooper, representing Educational Research, placed an order for Phenol-2-P along with lab equipment, to some outfit, did you have personal knowledge of this?

M: Could you define personal knowledge.

BO: What knowledge did you have to take this affidavit before his honor? For a search warrant?

M: Through investigation conducted by agents of DEA.

BO: Did you conduct, did you make this investigation yourself?

M: Not that particular fact of the investigation, no.

BO: Did you ever meet this Howard Cooper or talk to this Howard Cooper you talked about in your affidavit?

M: No.

BO: Do you know who he is or where he is?

M: Your asking me two questions. You want first do I know who he is?

BO: Yes.

M: I believe at this time that his Howard Cooper is Mr. Giskin.

M: COrrrect.

BO: And then you say on July 28th at 4 p.m., an informant who had demonstrated patterns of reliability in the past was greeted at the front door of the Giskin residence by an unknown male who had white flakes of an unknown substance scattered on his hair and beard. How did this informant advise you of this? Or did he advise somebody else of this?

M: The informant advised someone else of this.

BO: So he didn't advise you of it at all?

M: Cgrrrect.

BO: So, and did you, did you talk to the informant at all? I realize Judge Hey's ruling; I'm not going to ask him who the informant was I just read the decision of Judge Hey. Did you talk to the informant?

M: When?

BO: At any time before you went to get the search warrant.

M: I have talked to the informant before, yes.

BO: About this case?

M: Yes, I have.

BO: Before you went to get the search warrant?

M: Well your asking me...

BO: Any time before you went to get the search warrant, August 29, 75, did you talk to the informant about this case, the case of U.S. of America v Howard Giskin?th

HVA: I'm not sure if we are not outside the scope of a preliminary exam here in this too. I think that we should be more concerned with the complaint then with the affidavit.....

BO: You told me to go to the affidavit for the search warrants. That's where I am. I was at the complaint and...

HVA: All in all, The questions as to issuance and the search warrant and that execution I think are really outside the scope of a preliminary exam;

WD: Yes, I would also add I'm not trying to be nit picky about this Mr. Oconnell but a lot of these matters that are being raised are discovery procedures, are discovery matters, which would be available and again I realize that your client is entitled to presumption of innocence but we're being really bogged down in testing the credibility of Mr. Mangor and I'm not completely sure that the preliminary

1 passed the Gifkin residence?

2 A That is what I was referring to when I said --

3 Q (Interrupting) When you were standing 25 feet in
4 front of the Gifkin residence?

5 A I smelled it both times.

6 Q I see. And do you know in which direction the wind
7 was blowing that day?

8 A No, I don't.

9 MR. O'CONNELL: That is all I have.

10 THE COURT: Cross-examination.

11

12

CROSS-EXAMINATION

13

BY MR. CULLUM:

14

Q Did you report what you had observed and smelled to
15 anyone from the Drug Enforcement Administration?

16

A Yes, I did.

17

Q Who did you report it to?

18

A I went to Dannemora, and I made a phone call, and I
19 tried to get a hold of Mr. Fitzpatrick, and I could
20 not reach him at the time. I left my phone number
21 there, and I was at a local bar in Dannemora, and he
22 finally returned my call, and I told him what I saw
23 and smelled, and he proceeded from there.

24

Q Did you ever assist Mr. Fitzpatrick in the past?

25

A Yes, I have.

1 A Yes.

2 Q And you are 30819311

3 A Yes.

4 Q And what are your job duties?

5 A I give the DEA information --

6 THE COURT: (Interrupting) I can't
7 hear you.

8 THE WITNESS: I am a paid informant.

9 BY MR. O'CONNELL:

10 Q Are you paid by the job?

11 A Yes, I am.

12 Q And are you paid by the arrest?

13 A By the conviction, sir.

14 Q By the conviction. So you don't get paid on a case
15 until there is a conviction?

16 A Exactly.

17 Q Now, did you, as you stated in your affidavit here,
18 at 3 p.m. on August 28th, 1975, did you go to the
19 front door of a redwood chalet on the Herron Road,
20 off of New York Route 374 west of Dannemora, New York?

21 A Yes, I did.

22 Q And did you knock on the door?

23 A Yes, I did.

24 Q Was there any answer?

25 A No, there wasn't.

- 1 Q And what did you do then?
- 2 A I returned to the main road and went in the woods,
3 and set a camp up.
- 4 Q Where did you set your camp up, sir?
- 5 A Behind Mr. Gifkin's house.
- 6 Q And on Mr. Gifkin's property?
- 7 A I am not sure.
- 8 Q By behind, you mean west of Mr. Gifkin's property?
- 9 A It would be facing the house would be to the left-
10 hand side, behind.
- 11 Q Now, did you, as you stated in here, did you go back
12 to the door again, later on?
- 13 A I didn't go to the door of Mr. Gifkin's house because
14 he was standing outside of the house.
- 15 Q And did you ask Mr. Gifkin if it was all right if
16 you camped outside of his house?
- 17 A Yes.
- 18 Q And what answer did he give you?
- 19 A He said, no, that he used his rifle for practicing
20 and shooting out in the woods, and it wasn't wise
21 for me to stay about there.
- 22 Q Now, did he give you directions as to another
23 camping site?
- 24 A Yes, he d'id.
- 25 Q Now, did you leave the area at that time?

1 Q and on how many occasions?

2 A On numerous occasions. Over a hundred cases, I would
3 say.

4 Q Over what period of time?

5 A A period with the Customs, and then the DEA, probably
6 in the past six years.

7 Q And any of the cases that you were involved in re-
8 sulted in convictions?

9 A Yes.

10 Q Federal or state convictions?

11 A Three federal convictions.

12 Q And were they convictions relating to narcotic
13 offenses?

14 A Yes.

15 MR. O'CONNELL: I respectfully object
16 to this line of questions on the ground of what
17 was told the Magistrate, and not what was heard.

18 THE COURT: We have gotten far afield
19 of what was told to the Magistrate with your
20 questioning, and now let him answer. The answer
21 may stand.

22 MR. CULLUM: I have no further
23 questions.

24 THE COURT: You are excused.

25 (Whereupon, the witness was excused.)

1 Q And you told him it was indicative, possibly, of
2 amphetamine or methamphetamine, but you also feel
3 and you felt that he knew it was indicative of
4 putrefied bodies or dead bodies?

5 A He also told me some other background that he had
6 developed, and along with the use of phenyl-2-pro-
7 panone, and the odor of putrefied flesh, or on a
8 mean base, I told him that it was a good probability
9 that amphetamine or methamphetamine was being
10 produced.

11 Q And the results of good probability that there was
12 rotting flesh on the premises?

13 A Could you repeat that, please?

14 Q Will you tell this Court, was there also a good
15 possibility that there was rotting flesh on the
16 premises?

17 A I don't know how good a possibility it was.

18 THE COURT: That isn't the question.
19 The question is: Did you tell that to Mr.
20 Mangor?

21 THE WITNESS: Oh, no, I didn't tell
22 him that there was a good possibility --

23 BY MR. O'CONNELL:

24 Q Did you tell him anything about rotting flesh?

25 A No, he told me about the rotting flesh.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Respondent

- against -

HOWARD P. GISKIN,

Defendant-Appellant.

AFFIDAVIT OF SERVICE

Docket No.
76-1073

STATE OF NEW YORK)

) ss:

COUNTY OF CLINTON)

JUNE SEYMOUR being duly sworn, deposes and says: That deponent is not a party to the action, is over 18 years of age and resides at Plattsburgh, New York; that on the 24th day of March 1976 deponent served the within three copies of Appellant's Brief and Appendix upon James M. Cullum, Assistant U.S. Attorney, the attorney for the plaintiff-respondent in this action, at U.S. Attorney's Office, U.S. Courthouse and Post Office Bldg., Albany, New York, by depositing three true copies of the same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the U.S. post office department within the State of New York.

Sworn to before me this

25th day of March 1976.

NOTARY PUBLIC

June Seymour
JUNE SEYMOUR

BYRON O'BONNELL
Notary Public in the State of New York
Residing in the County of Clinton
My Commission Expires March 30, 1978